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No. 88-1782

In the Supreme Court of the United States

OCTOBER TERM, 1988

KEVIN L. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether law enforcement officers may question a suspect about a crime after the suspect has asked to speak to the prosecutor.

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OPINIONS BELOW

The order of the Court of Military Appeals affirming petitioner's conviction (Pet. App. 1a) is not yet reported. The opinion of the Army Court of Military Review (Pet. App. 2a-7a) is reported at 27 M.J. 614.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 9, 1989. The petition for a writ of certiorari was filed on May 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Ord, California. He was convicted of rape, in violation of Article 120 of the

Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920. He was sentenced to seven years' imprisonment, a dishonorable discharge, forfeiture of part of his pay, and a reduction in rank. The convening authority approved the findings and sentence, but slightly reduced the forfeiture of pay. The Army Court of Military Review affirmed the findings and sentence. Upon discretionary review, the Court of Military Appeals affirmed.

1. On the evening of September 11, 1987, Ingrid Reed, the wife of a soldier assigned overseas, attended a party at a friend's home at Fort Ord, California. Tr. 212-213. Several male soldiers, including petitioner, also attended the party. Tr. 213, 439. Reed had several alcoholic drinks during the evening and eventually passed out. Tr. 216, 217. Some friends carried her to a back bedroom. Tr. 174-175, 249. When she awoke, she was not wearing any clothes, and she was in a dark room. Tr. 217. Passing in and out of consciousness, she felt two or three persons lying on top of her in succession, she saw a penis, and she felt like she was having intercourse. Tr. 218-219, 233, 242-243. At one point, someone hit Reed in the face and told her to "lay still bitch." Tr. 219. Reed remembered running from the house wrapped in a sheet and passing out at her home. Tr. 220. A friend called an ambulance, and after she received medical treatment, Reed reported the incident to an Army Criminal Investigation Division (CID) agent. *Ibid.*

2. Petitioner and several other suspects were apprehended on September 12, 1987. CID Special Agent Zimmerman fully advised petitioner of his rights under Article 31(b) of the UCMJ, 10 U.S.C. 831(b), and *Miranda* v. *Arizona,* 384 U.S. 436 (1966). Petitioner waived those rights, Tr. 301, and he executed a standard waiver-of-rights form, GX 10. In a sworn statement, petitioner admitted that he was at the party and that he went to the

bedroom with another woman to "check on" Reed, but petitioner denied having sex with Reed. GX 11. Petitioner was then released.

Approximately four hours later, petitioner was apprehended a second time after another suspect implicated petitioner in the rape. Tr. 43, 46. Special Agent Gunther met with petitioner in an interview room at the CID office and introduced petitioner to Captain Mary Spiece, a prosecuting attorney. Agent Gunther told petitioner: "This is a prosecutor for the United States Army. She's here assisting the CID in this investigation." Tr. 62; see Tr. 58, 167. Petitioner asked to talk to Captain Spiece in private. Tr. 51, 63, 315-318. Agents Gunther and Zimmerman left the room. Captain Spiece told petitioner that she could not advise him, that she was a prosecutor, and that "he could talk to a lawyer but it could not be her." Tr. 51, 63, 89, 317-318. After 10 to 20 seconds Captain Spiece left the room and related what she had told petitioner. Tr. 63. Agent Gunther then fully advised petitioner of his Article 31(b) and *Miranda* rights. Tr. 56, 84, 85, 89. Petitioner waived those rights, Tr. 44, and executed another standard rights waiver form, GX 1. In a sworn statement, petitioner admitted to unclothing and having sexual intercourse with Reed while she was unconscious and to watching another soldier have sexual intercourse with her. GX 2. Petitioner did not ask to speak with a lawyer during the questioning. Tr. 166.

3. Before trial, petitioner moved to suppress his confession. Petitioner alleged, among other things, that his waiver was invalid. Petitioner argued that his request to speak to Captain Spiece was an invocation of his right to counsel and that Agent Gunther therefore violated *Edwards* v. *Arizona,* 451 U.S. 477 (1981), when he subsequently questioned petitioner. Tr. 100-101. After an evidentiary hearing, the trial judge denied the motion.

Tr. 103-105. The judge found that petitioner's request to speak to Captain Spiece was not an invocation of the right to counsel and that the request therefore did not preclude the subsequent interrogation by Agent Gunther. Tr. 103-104. At trial, petitioner testified and recanted his confession. He claimed that his confession was the product of intoxication and confusion. Tr. 438-445, 457-458.[1]

4. The Army Court of Military Review affirmed. Pet. App. 2a-7a. The court observed that the "mere fact that [petitioner] requested to speak to someone who happened to be a lawyer does not necessarily amount to an assertion of the right to counsel." *Id.* at 4a (citation omitted). The court found that petitioner's request to speak to Captain Spiece was not a request for counsel, but was simply a re-

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[1] Other evidence aside from petitioner's confession linked him to the rape. Petitioner told Specialist Kevin Angelo, who was also at the party, that " 'we were messing with this German chick,' " Tr. 180, and petitioner attempted to persuade Angelo to go to the back of the house, Tr. 180-181, where Reed was lying unconscious, Tr. 174-175, 249. Angelo later saw a man, whom he could not identify as petitioner, in the room with a woman. The man removed a blanket from the woman and touched her while she was in a fetal position. The woman attempted to kick the man. Tr. 183-185, 191-193. Reed also remembered attempting to kick someone while she was lying down, Tr. 221, 231, although Reed could not identify petitioner as being at the party. Tr. 236. A physical examination of Reed after the incident revealed the presence of sperm in her vaginal tract. Tr. 207-208. Finally, a forensic examination revealed that petitioner (and four other suspects) had blood type O; that Reed had blood type A; that both petitioner and Reed were "secretors" (*i.e.*, their blood type can be discovered from testing other bodily fluids); that petitioner's trousers revealed the presence of blood types O and A in the groin area; that swabbings of Reed's vaginal area revealed the presence of semen with blood type O; and that petitioner's trousers revealed the presence of vomitus consistent with Reed's blood type (the evidence showed that Reed vomited after being placed in the back room, Tr. 250). Tr. 389-391, 397-399.

quest to speak to the prosecuting attorney. The court noted that petitioner understood that he had a right to a defense lawyer, but that petitioner "specifically asked to talk to Captain S[piece], the command prosecutor." *Id.* at 5a. Petitioner "never exhibited an unwillingness to talk to the investigator," the court found, *id.* at 5a-6a, and there was "no evidence to indicate that Captain S[piece] or the CID investigators misled [petitioner] about the desirability of retaining a lawyer or attempted to persuade [petitioner] to waive his right to counsel." *Id.* at 6a (citation omitted). The court of military review held, therefore, that petitioner's request to speak to the prosecutor did not trigger the rule of *Edwards* v. *Arizona, supra,* and did not bar the subsequent questioning by Agent Gunther. Pet. App. 6a-7a.[2]

The Court of Military Appeals summarily affirmed. Pet. App. 1a.

ARGUMENT

Petitioner contends that his request to speak to the prosecutor triggered the rule of *Edwards* v. *Arizona, supra,* and barred any subsequent questioning. All three courts below properly rejected that claim. As those courts correctly recognized, a suspect's remarks while in custody should be given their ordinary meaning, and petitioner's request to speak with a person whom he knew to be the prosecutor did not constitute an invocation of his right to counsel. That determination does not merit review by this Court.

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[2] The court also agreed with the trial judge's finding that petitioner's waiver was knowing, intelligent, and voluntary, and the court concluded that petitioner's confession was properly admitted into evidence. Pet. App. 7a. Petitioner has not separately challenged that ruling in this Court.

Miranda requires law enforcement officers to inform a suspect in custody that he has the right to consult with a lawyer before or during custodial interrogation. 384 U.S. at 471. If the suspect asks to speak with a lawyer, *Edwards* prohibits further custodial interrogation of the suspect until counsel has been made available to him or he initiates further communication, exchanges, or conversations with the police. 451 U.S. at 485. The rationale for that "bright-line prohibition," the Court has explained, is to prevent the police from engaging in the type of " 'badger[ing]' or 'overreaching' " that might "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (citations omitted).

Petitioner contends that the bright-line rule adopted in *Edwards* applies to this case, because his request to speak with Captain Spiece was tantamount to an expression of his intention to deal with the authorities only through counsel. That claim lacks merit because, as the court of military review found, petitioner was told that Captain Spiece was the prosecuting attorney. Pet. App. 5a n.2. Captain Spiece was introduced to petitioner as the prosecutor who was "assisting the CID in this investigation," Tr. 62, and petitioner was therefore on notice that the captain was "allied" with the CID officials. *Fare* v. *Michael C.*, 442 U.S. 707, 720 (1979).

To be sure, petitioner asked to speak with Captain Spiece "as a lawyer." Tr. 51. But putting the request that way did not convert petitioner's request to speak to the prosecutor into an invocation of the right to counsel. While he may have wanted to call on Captain Spiece's legal expertise to help determine the strength of the case against him or the intentions of the prosecution, a request for ad-

vice of that kind from the prosecution is wholly different from a request to deal with the prosecution through one's own counsel.

Contrary to petitioner's contention, his request to speak to Captain Spiece was not an "ambiguous" request for counsel, Pet. 7, but was a "clear and concise" statement of his desire to talk to the prosecutor, as the court of military review found. Pet. App. 4a. Far from expressing a "desire to deal with the police only through counsel," *Edwards*, 451 U.S. at 484, petitioner asked to speak to the prosecuting attorney.[3] The ordinary meaning of petitioner's straightforward request was therefore clear. Cf. *Connecticut* v. *Barrett*, 479 U.S. 523, 529 (1987) ("Interpretation [of a suspect's request for counsel] is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous."). Any doubt about whether petitioner wanted to speak to a lawyer vanishes in light of the fact that moments later petitioner waived his right to counsel after he was specifically advised that he had a right to consult with a lawyer "before, during and after questioning." GX 1, para. 3. In fact, petitioner agreed during his testimony at the suppression hearing that he "understood that [he] had a right to [a] defense lawyer" after he was so advised by the CID agent. Tr. 93. Under these circumstances, petitioner did not invoke his right to counsel, and the *Edwards* rule was never triggered.

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[3] Petitioner made that point in his testimony during the suppression hearing. Asked by his counsel whether he had "asked to speak to an attorney at one time that evening," petitioner responded "[t]hat was just to speak to Captain Spiece, sir." Tr. 86. Petitioner reinforced that point during trial when he testified about his conversation with Captain Spiece. Petitioner testified that "she stated that she was a prosecutor or a lawyer, something like that state of nature and she wouldn't be able to help and I—and I asked her—I still wanted to talk with her." Tr. 445.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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